No. 95-1826

In The

Supreme Court of the United States

October Term, 1995

D.L. THOMAS and HAZEL THOMAS,

Petitioners,

v.

AMERICAN HOME PRODUCTS, INC.,
BOYLE-MIDWAY, INC. and
AMAZING PRODUCTS, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit**

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

SUMMARY OF THE ARGUMENT

Petitioners, D.L. Thomas and Hazel Thomas, filed a petition for writ of certiorari in this court on May 9, 1996. Therein petitioners presented three questions, and now file this supplemental brief to call attention to a new case not available at the time of petitioners' original filing of its writ for certiorari.

Petitioners' second reason for granting the petition for certiorari was based upon the 11th Circuit's erroneous conclusion "in part" that the Georgia Supreme Court's ruling in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, would not apply to the injuries involved in the present case, based on the reasons expressed in *ICI Americas v. Banks*, 218 Ga. App. 237, footnote 1, regarding retroactivity.

Petitioners had argued in the 11th Circuit that the holding in *Banks v. ICI* had been held retroactive, at least as to *Banks v. ICI* itself, and that therefore *Banks v. ICI* applied to the present case. The 11th Circuit concluded otherwise and denied appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing. (See appendix to writ, 28a).

On April 29, 1996, not published in the opinion section of the Fulton County Daily Report until Tuesday, May 7, 1996 (received in this office Wednesday, May 8, 1996, the day petitioners' writ was mailed to this court) the Georgia Supreme Court once again considered the case of *Banks v. ICI Americas, Inc.*, ___ Ga. ___ (case no.: S95G1887) (4/29/96) (*Banks* III) and specifically held that *Banks v. ICI Americas, Inc.*, 264 Ga. 732, (*Banks* I) *should* be applied retroactively, contrary to the 11th Circuit.

The Georgia Supreme Court now having held the *Banks* I risk-utility analysis applies retroactively, and the only *stated* reason for the denial of appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing by the 11th Circuit being that *Banks* I would *not* apply retroactively to the injuries involved in this case (appendix to petition for writ, 28a) petitioners ask that this case be reversed or remanded to the 11th Circuit, it now being clear under *Banks* III, that the 11th Circuit erroneously concluded that *Banks* I would not apply to the injuries involved in this case.

ERRATA IN PETITION FOR WRIT OF CERTIORARI

Petitioners show that in the table of authorities at page iv, *ICI Americas v. Banks* should be referenced at 218 Ga. *App.* 237 and the same notation should be made at page 12 of the petition. *ICI Americas v. Banks* at 218 Ga. App. 237 is the Georgia Court of Appeals' ruling, and is hereinafter referred to as *Banks* II.

ARGUMENT AND CITATION OF AUTHORITY

Petitioners file this supplemental brief to bring to the attention of this court the new case of *Banks v. ICI Americas, Inc.*, ___ Ga. ___ (case no.: S95G1887) (4/29/96), which came to the attention of your petitioners' counsel on the day the petition for writ of certiorari was mailed to this court.

Petitioners presented three questions to this court, and the latest decision in the line of *Banks v. ICI Americas, Inc.* cases (referred to hereinafter as *Banks* I, II or III) has now settled the question of whether or not the risk-utility analysis set forth in *Banks* I is to be applied retroactively. As petitioners contended to the 11th Circuit, *Banks* I should have been applied retroactively, and therefore applied to this case. *ICI Americas v. Banks*, 218 Ga. App. 237 (hereinafter referred to as *Banks* II) recognized implicitly that the Georgia Supreme Court had at least applied *Banks* I retroactively as to the *Banks* case itself. However, the 11th Circuit concluded that despite *Banks* I being returned to the Georgia Court of Appeals, to grant plaintiffs a new trial upon that court's determination that the remaining enumerations of error did not preclude a new trial, that nevertheless *Banks* I would not apply to the injuries involved in the present case, "[i]n part because we conclude, for the reasons expressed in *I.C.I. Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I.*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case. . . .".

Thus the only stated reason for denying appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing was that the 11th Circuit noted that Georgia law recognizes partial prospectivity, and that therefore *Banks* I would not apply retroactively to the injuries involved in the present case. Based on *Banks* III, that only stated reason is incorrect.

Inasmuch as the Georgia Court of Appeals held that upon retrial a jury would not be allowed to consider whether ICI was liable for punitive damages, the case

was returned to the Georgia Supreme Court for further determination in *Banks* III. In *Banks* III the Georgia Supreme Court made clear that *Banks* I was to be applied retroactively, and at that time fully set forth its explicit application of *this* court's three-prong test as set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (92 SC 349, 30 LEd 2d 296) (1971).

The Georgia Supreme Court in *Banks* III noted that "the language in *Banks* I did not admit of any limitation on the grant of new trial." The Georgia Supreme Court went on to quote *General Motors Corp. v. Rasmussen*, 255 Ga. 544, 545-546(2) (340 S.E.2d 586) (1986) for the proposition that "court rulings that substantially alter the law normally apply retroactively." The Georgia Supreme Court in *Banks* III further went on to note that "[o]ur direction to the Court of Appeals in *Banks* I regarding plaintiffs' entitlement to a new trial clearly reflected our determination that we had considered the purpose and history of product liability law and the inequities that could be created by our holding before ruling that *Banks* I would apply to the parties in that case."

The Georgia Supreme Court in *Banks* III went on to explicitly apply the three-pronged test set forth in *Chevron Oil v. Huson* to this case:

> Balancing the merits and demerits, we find that the purpose and effect of our holding in *Banks* I will be best served by an even application of its holding in the field of product liability law and that retroactive application would further its operation. We find no merit in ICI's arguments that it relied on pre-*Banks* I law when it created and manufactured the rodenticide and thus

> reject ICI's argument that it would be inequitable to hold it liable for a defectively designed product under the standard of conduct set forth in *Banks* I.
>
> Accordingly, under the test in *Flewellen*, supra, the Court of Appeals erred by failing to apply *Banks* I retroactively.

In the petition for writ of certiorari filed by the Thomas' in this case, petitioners asked in their second reason for granting the petition that this court issue the writ of certiorari to reverse the 11th Circuit decision in this case, and certify the retroactivity question to the Georgia Supreme Court for a definitive analysis and decision. In the alternative, petitioners requested that this court directly certify this question to the Georgia Supreme Court for decision. *Banks* III having now determined the retroactivity question in favor of petitioners, this case should be remanded to the 11th Circuit.

A review of the facts in the *Banks v. ICI* case, as more fully set forth in the Court of Appeals' decision, *Banks* II, renders this conclusion even more compelling, when read in conjunction with the analysis set forth by the Supreme Court of Georgia in its opinion reversing the Court of Appeals' decision. The facts, as set forth by the Court of Appeals at page 523 of its decision, showed that:

> Talon-G was packaged in a container with EPA – approved labelling, which displayed warnings cautioning users that it should be kept out of reach of children; that it may be harmful or fatal if swallowed, and that it be stored in its original container in a location inaccessible to children. ICI sold Talon-G only to professional pest control operators. The plaintiffs, the child's parents,

> produced evidence that a pest control company servicing the Boys Club placed the Talon-G in an unmarked, unlabeled container stored in an unlocked cabinet at the Boys Club. The poison was apparently found in the container at the Boys Club by the child, who consumed a quantity of it.

As did petitioners in this case, the plaintiffs in *ICI v. Banks,* brought suit against ICI on counts of negligence and strict liability. There was evidence in *ICI v. Banks* that the products would be misused and that the misuse would be foreseeable to the manufacturers. In the Court of Appeals' opinion in *ICI v. Banks,* at page 524, it is noted that there was evidence that the danger could have been reduced by the addition of ingredients which would cause humans, but not rats, to reject it because it was bitter-tasting, or vomit after ingesting it. In the case at hand, there was evidence regarding Lewis Red Devil Lye and Liquid Fire, that both could have been made safer when they were manufactured, and still do the same job, by creating a formulation with a lower percentage of the undiluted chemicals that would perform the same function and be a much safer formulation. (See petition @ p. 8)

Furthermore, despite ICI's specifically cautioning users to keep this chemical out of the reach of children, warning that it was possibly fatal if swallowed, specifically noting that it should be stored in its original container in a location inaccessible to children, and selling Talon-G only to professional pest control operators, the Supreme Court of Georgia nevertheless granted to plaintiffs in that case a new trial based on its risk-utility

analysis. A new trial was granted despite the intervening negligent act of a pest control company, in placing this Talon-G in an unmarked, unlabeled container stored in an unlocked cabinet at the Boys Club. Petitioners here contend that this result was reached inasmuch as a jury's risk-utility analysis regarding these dangerous chemicals precedes and moots any issue of contributory negligence, failure to read or other intervening proximate cause. The risk of danger and injury posed by these dangerous and volatile chemicals may, in the trier of facts' eyes, outweigh their utility, such that if a jury finds that the chemicals as formulated (or, depending on the facts and the chemicals' properties, in any formulation whatsoever) were simply too dangerous and that the risk of using these chemicals outweighed their utility, that they should never have been sold to the public in the first place. In using the risk-utility analysis, and weighing all of the factors involved, a jury may also find that though the chemicals' utility merits their usage, despite their dangerous nature, that they be manufactured in diluted strength to reduce or eliminate the possibility of explosion, and that therefore the *failure* to use an available alternative safer formulation that would not explode led to the injuries of D.L. Thomas.

This case has to be reanalyzed in light of *Banks* III to apply the risk-utility analysis to this case.

The Georgia Supreme Court in adopting the risk-utility analysis (which it found to be consistent with Georgia law) specifically included a non-exhaustive list of general factors including "the gravity and severity of the danger posed by the design . . . " and "the availability of an effective substitute for the product which meets the

same need but is safer . . . " See *Banks* I footnote 6, page 8. The balancing of these two factors is precisely what a jury must do in this case, and this certainly cannot be a summary judgment question, unless the District Court or the 11th Circuit can somehow find as a matter of law that the utility of a faster, explosive drain cleaner outweighs the risk of catastrophic injury, despite the known availability of safer design alternatives that more slowly clear drains.

Petitioners submit that this is precisely the situation and the analysis that it has argued in this case and in the Suggestion for Rehearing En Banc and is precisely on point. Since the case was decided on motions for summary judgment by respondents, and there is expert opinion testimony that a safer formulation of chemical drain cleaners could be made to perform the same job according to expert Dr. Abraham, it is therefore clearly a jury question in this case as to whether or not the respondents' products were defectively designed and/or inherently dangerous, based on the factors set forth in *Banks* I including the gravity and severity of the danger posed by the design, which in this case was the blindness of D.L. Thomas – a severe injury – and the fact that there is expert testimony of the availability of an effective substitute to the product which meets the same need *but is safer*.

With the Georgia Supreme Court's decision in *Banks* III, the retroactivity question has now been answered in favor of petitioners by holding explicitly that *Banks* I should be applied retroactively, and therefore petitioners ask that this case be reversed or remanded to the 11th Circuit for further consideration consistent with *Banks* III.

For although the 11th Circuit denied appellants' suggestion for rehearing (or hearing) en banc and appellants' petition for rehearing only *in part* based upon footnote 1 of *Banks* II, regarding the retroactivity issue, this was the *only* reason given, and based on *Banks* III, that decision was erroneous.

CONCLUSION

Petitioners therefore request that this court issue the writ of certiorari to the 11th Circuit Court of Appeals, and reverse or remand this case to that court for further consideration in light of *Banks v. ICI Americas* III.

Respectfully submitted,

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